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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 732

ROOSEVELT RACEWAY, INC.,

Appellant,

v.

COUNTY OF NASSAU and PETER P. ROCCHIO, SR., as COMPTROLLER of NASSAU COUNTY,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

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ROOSEVELT RACEWAY, INC.,

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Pursuant to Rule 16 of the Revised Rules of this Court, appellees, County of Nassau and Peter P. Rocchio, Sr., as Comptroller of Nassau County, move that the judgment of the Court of Appeals of the State of New York be affirmed on the ground that the questions presented by this appeal are so unsubstantial or well-settled as not to require further argument, or, in the alternative, to dismiss the appeal on the ground that it is not within the jurisdiction of this Court because it does not present a substantial federal question.

Statement

This proceeding was commenced by appellant in the Supreme Court of the State of New York, County of Nassau, pursuant to Article 78 of the New York Civil Practice Law and Rules, to review a determination by appellee Comptroller assessing a deficiency against appellant on account of a county tax imposed upon admissions to the harness race track operated by appellant within the County of Nassau. The proceeding challenged the legality and constitutionality of the local law which imposed the admissions tax (Nassau County Local Law No. 1, 1956) (set forth on page 5 of the Statement as to Jurisdiction) and the enabling act of the New York State Legislature that authorized the adoption of the local law (Laws of 1956, ch.837; cited as McKinney's Unconsolidated Laws, §9502) (set forth on page 4 of the Statement as to Jurisdiction). The proceeding was transferred to the Appellate Division, Second Department, for disposition.

The Appellate Division decision, from which two of the five justices dissented, found the challenged enactments denied petitioner the equal protection of the laws (App. St.J. 17a).* The Court of Appeals reversed the determination of the Appellate Division and found the statutes were not violative of the equal protection of the laws.

The Court of Appeals, in an opinion by Chief Judge Desmond, concurred in by four other judges (App.

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* References are to pages in the appendix bound with the Statement as to Jurisdiction filed by appellant.

St.J. 9a) (the two dissenting judges wrote no opinion), considered and rejected several state constitutional and non-constitutional grounds of alleged invalidity asserted by appellant and disposed of the constitutional issue of equal protection by finding the challenged enactments must be sustained because there are several conceivable bases that justify the particular statutory classification. The opinion of the Court of Appeals is officially reported at 18 N.Y.2d 30 (1966).

This is an appeal from the order of remittitur of the Court of Appeals of the State of New York (App. St.J. 1a) made and entered on June 9, 1966, and from the judgment on remittitur of the Supreme Court, Nassau County, New York (App. St.J. 4a) made and entered on July 6, 1966. Notice of Appeal was filed on September 2, 1966 with the Clerk of the Supreme Court, Nassau County, the court in possession of the record. The Statement as to Jurisdiction made by appellant was served upon the attorney for the appellees on October 28, 1966.

Facts

Appellant is a corporation specially chartered under New York law to operate a harness racing track at Westbury in the County of Nassau, State of New York.

In 1956, the New York State Legislature passed an enabling act authorizing counties and cities adjacent to a city having a population in excess of two million to tax admissions to harness racing meets

conducted within their limits at a rate not in excess of 30% of the admission price (L. 1956, ch.837). Admissions to harness tracks in other areas of the state are subject to a tax not exceeding 15%, as are all "flat" or thoroughbred horse meets throughout the State of New York. There are no thoroughbred tracks in the cities and counties to which the enabling act is applicable.

Nassau County came within the ambit of the act as it is adjacent to the City of New York, a city with over two million in population. Nassau County Local Law No. 1, 1956 imposed the 30% tax on admissions to harness race meetings conducted within Nassau County.

Appellants paid the tax to the County at the 30% rate without protest in every year after passage of the local law in 1956 and paid the tax for the harness meeting covering the period July 30, 1964, to September 28, 1964, except that petitioner withheld $8,695.46, solely for the purpose of testing the validity of the tax.

Pursuant to statute, appellant requested—and was granted—a hearing before the Nassau County Comptroller then in office to redetermine the tax. Concluding that he had no jurisdiction to determine the constitutional question, the Comptroller adhered to his previous determination of a tax deficiency, whereupon this proceeding pursuant to Article 78 to declare the statutes invalid was commenced.

The petition commencing this proceeding challenged the validity of the statutes on several state constitutional and other non-federal grounds, as well as the equal protection clause of the New York State and

Federal Constitutions. All of the non-constitutional grounds and state constitutional grounds (other than equal protection) urged by appellant were rejected by the Appellate Division and the Court of Appeals. In addition, the Court of Appeals found appellant was not denied the equal protection of the laws and upheld the constitutional validity of the statutes. A motion thereafter made by appellant in the Court of Appeals to recall and amend the remittitur so as to recite the constitutional question raised was denied on the ground that amendment was unnecessary since the court had discussed and passed upon the federal constitutional question in its opinion.

ARGUMENT

The classification made by the State Legislature permitting a city or county adjacent to a city having a population in excess of two million to impose a tax on admissions to harness racetracks not to exceed 30% of the admission price was reasonable and is not violative of the equal protection clause of the Fourteenth Amendment to the Federal Constitution merely because harness racetracks in other areas of the state and thoroughbred racetracks may be subject to a local admissions tax not to exceed 15% of the admission price.

The sole issue raised here is the reasonableness of a classification contained in a state tax statute under the equal protection clause. This issue in various contexts has been considered by this Court on numerous occasions and the criteria established by the applicable

law requires a finding that the classification contained in the enabling act in the instant case meets the constitutional requirements of the Fourteenth Amendment. *E.g., Allied Stores of Ohio* v. *Bowers,* 358 U.S. 522 (1959); *Carmichael* v. *Southern Coal & Coke Co.,* 301 U.S. 495 (1937); *People ex rel. Hatch* v. *Reardon,* 204 U.S. 152 (1907); *Ampco Print-Advs. Corp.* v. *City of New York,* 14 N.Y.2d 11 (1964), *appeal dismissed,* 379 U.S. 5. Indeed, this Court has stated that "in taxation there is a broader power of classification than in some other exercise of legislation." *Citizens' Telephone Co. v. Fuller,* 229 U.S. 322, 329 (1913).

This Court will dismiss the appeal and decline to review the state court's determination sustaining the constitutional validity of a state statute where the alleged denial of equal protection of the laws is unsubstantial or contrary to the law established by prior decisions of the Court. *Palmer Oil Corp.* v. *Amerado Petroleum Corp.,* 343 U.S. 390 (1952); *Congress of Industrial Organizations* v. *McAdory,* 325 U.S. 472 (1944).

The burden which the law imposes on litigants who would invoke the equal protection clause of the Fourteenth Amendment to overthrow state legislation is most heavy and exacting. To succeed, a petitioner is required to negate "every conceivable basis which might support [the legislative classification]." *Madden* v. *Kentucky,* 309 U.S. 83, 88 (1940). Appellant has failed to meet this burden in the court below or in the Statement as to Jurisdiction in this Court.

The state legislature enjoys wide latitude and discretion in choosing who shall bear the tax burden and

may treat different classes of persons in different ways. *E.g., Allied Stores of Ohio* v. *Bowers,* 358 U.S. 522, 526-7 (1959) and cases cited therein; *Louisville Gas and Electric Company* v. *Coleman,* 277 U.S. 32, 37 (1928); *People ex rel. Hatch* v. *Reardon,* 184 N.Y. 431, 435 (1906), *aff'd,* 204 U.S. 152 (1909); *Ohio Oil Co.* v. *Conway,* 281 U.S. 146, 159 (1929).

The equal protection clause is not violated merely because a particular class is selected for taxation or unequal treatment is afforded different classes of taxpayers. *Carmichael* v. *Southern Coal & Coke Co.,* 301 U.S. 495 (1937).

Nor does the equal protection clause forbid selection for taxation of one class within any designated category while leaving untaxed, or taxed at a different rate, other classes within the same category. *Heisler* v. *Thomas Colliery Co.,* 260 U.S. 245 (1922) (tax placed on anthracite coal mines but not on bituminous mines); *Magnano Co.* v. *Hamilton,* 292 U.S. 40 (1934) (tax on oleomargarine at different rate than tax on butter).

The sole constitutional requirement is that the tax discrimination be founded upon a reasonable distinction, or a difference in state policy. "If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law." *Brown-Forman Co.* v. *Kentucky,* 217 U.S. 563, 573 (1910). See also, *Allied Stores of Ohio* v. *Bowers,* 358 U.S. 522, 528 (1959); *American Sugar Ref. Co.* v. *Louisiana,* 179 U.S. 89 (1900).

It has long been settled by this Court that a state statutory classification, although discriminatory, "is not arbitrary nor violative of the equal protection clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain it." *Allied Stores of Ohio* v. *Bowers,* 358 U.S. 522, 528 (1959), citing, *inter alia, Lindsley* v. *Natural Carbonic Gas Co.,* 220 U.S. 61 (1911).

State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. *McGowan* v. *Maryland,* 366 U.S. 420, 425-426 (1961). The legislative purpose need not be known with certainty. *Southwestern Oil Co.* v. *Texas,* 217 U.S. 114, 126 (1909).

The differences justifying inequal statutory treatment need not be great. *State Board of Tax Commissioners of Indiana* v. *Jackson,* 283 U.S. 527, 538 (1930). Indeed, the classification, in order to be unconstitutional, must be palpably arbitrary. See *Allied Stores of Ohio* v. *Bowers,* 358 U.S. 522, 527, 529 (1959).

The sole issue raised here is whether there is any conceivable justification for the particular statutory classification.

The Court of Appeals conceived of several reasons to justify the different tax treatment of harness tracks in the areas of the state covered by the enabling act. In discussing conceivable justification for the particular statutory classification, the Court of Appeals noted that:

"For instance, harness racing is generally carried on at night and flat racing in the daytime. The Legislature could have come to the conclusion that night operations result in greater municipal costs than those in the daytime. Then, too, the harness racing tracks subject to the 30% authorization are in Nassau and Westchester Counties where there is little public transport and very large attendance and these tracks might be thought to require expenditure by the localities of larger amounts for highways. It can be judicially noticed and appears from official statistics that the two harness tracks which could be affected by these two increased admissions tax are in the heavily populated metropolitan area, again justifying the conclusion that local government would be put to greater expense thereby than would be the case in rural areas." App. St.J. 15a.

In addition, the Court of Appeals recognized the long established state policy of separate treatment for harness and thoroughbred racing. A classification based on a difference in state policy supports the conclusion that appellant was not denied equal protection of the law. *E.g., Allied Stores of Ohio* v. *Bowers,* 358 U.S. 522, 528 (1959); *Brown-Forman Co.* v. *Kentucky,* 217 U.S. 563, 573 (1910); *American Sugar Ref. Co.* v. *Louisiana,* 179 U.S. 89 (1900). As the Court of Appeals concluded, after describing examples of distinctive treatment accorded flat tracks and harness tracks by the legislature over a long period (App. St.J. 12a-13a):

"It is thus apparent that the Legislature, for whatever reason, has consistently and over a

period of years put these two kinds of racetracks into different classifications for purposes of control and taxation." App. St.J. 13a.

Appellant has failed to satisfy its burden of negativing every conceivable basis which might support the tax classification. Appellant's inadequate response to the several conceivable bases noted by the court below is that there is no evidence in the record to support the reasons conceived by the Court of Appeals to justify the classification. Statement as to Jurisdiction, pages 12-13. This principal argument of appellant misconceives the law in this area established by this Court.

There is no requirement that the possible underlying rationale for legislative classification be supported by evidence in the record. A legislative distinction is not arbitrary "if any state of facts reasonably can be conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assumed." *Rast* v. *Van Deman & Lewis,* 240 U.S. 342, 357 (1916). Moreover, "it makes no difference that the facts may be disputed or their effect opposed by argument and opinion of reasonable strength." *Ibid.* See also, *Allied Stores of Ohio* v. *Bowers,* 358 U.S. 522, 528 (1959).

As this Court has appropriately noted, when a legislature adopts a tax statute "courts cannot assume that its action is capricious, or that, with its informed acquaintance with local conditions to which the legislation is to be applied, it was not aware of facts which afford reasonable bases for its action." *Carmichael* v. *Southern Coal & Coke Co.,* 301 U.S. 495, 510 (1937). See also, *Madden* v. *Kentucky,* 309 U.S. 83, 88 (1940).

Conclusion

For the foregoing reasons, the appeal should be dismissed, or, in the alternative, the judgment below should be affirmed.

Respectfully submitted,

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November 23, 1966.